IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gulzar Transport Inc. v. British Columbia (Container Trucking Commissioner),* 2023 BCSC 1601

Date: 20230912
Docket: S214787
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

Between:

Gulzar Transport Inc. and Jet Speed Transport Inc.

Petitioners

And

British Columbia Container Trucking Commissioner

Respondent

Before: The Honourable Justice Chan

On judicial review from: An order of the British Columbia Container Trucking Commissioner, dated March 19, 2021 (*Gulzar Transport Inc. and Jet Speed Transport Inc.*, CTC Decision No. 02/2021).

Reasons for Judgment

Counsel for the Petitioners:	C.E. Hunter K.C. A. Calvert
Counsel for the Respondent:	J.M. Patrick
Place and Date of /Hearing:	Vancouver, B.C. July 26, 2023
Place and Date of Judgment:	Vancouver, B.C. September 12, 2023

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Introduction

[1] Gulzar Transport Inc. (“Gulzar”) and Jet Speed Transport Inc. (“Jet Speed”) (collectively, the “Companies”) seek judicial review of a decision of the British Columbia Container Trucking Commissioner (the “Commissioner”) dated March 19, 2021, CTC Decision No. 02/2021 (the “Second Reconsideration Decision”). In the Second Reconsideration Decision, the Commissioner imposed the maximum $500,000 administrative penalty on the Companies for under-paying its truck drivers contrary to legislated minimum rates, and then trying to cover-up the underpayments during an audit conducted by the Commissioner’s office. The Companies argue the Second Reconsideration Decision was procedurally unfair and patently unreasonable, and ought to be set aside.

[2] The Commissioner argues the Second Reconsideration Decision was appropriate, considering the seriousness of the misconduct and the need for general deterrence. The Commissioner argues reading the Second Reconsideration Decision as a whole, there was no procedural unfairness or patent unreasonableness. As such, the Second Reconsideration Decision does not meet the threshold for judicial intervention.

Legislative Background and Procedural History

[3] I take the following background information from an affidavit of the manager of business operations at the Commissioner’s office, admitted into evidence in this proceeding.

[4] The Companies are in the business of providing container trucking services in the marine ports in the Lower Mainland. The hauling and movement of shipping containers is known as drayage.

[5] There were a series of work stoppages and labour disputes in the drayage industry in 1999 through to 2014, causing disruption to the flow of goods through the Vancouver ports. The labour disputes arose around low rates of compensation to drivers, companies undercutting each other in wages paid to drivers and the industry’s

lack of response to increasing fuel costs. Despite a negotiated memorandum of agreement in 2005 requiring trucking companies to pay minimum rates to drivers, driver compensation issues persisted.

[6] There was again a work stoppage at the ports in 2014. An independent review was conducted by labour negotiators Mr. Vince Ready and Ms. Corrin Bell in 2014. In their report, they recommended the creation of a provincially regulated agency to oversee the industry. In response, the provincial government enacted the *Container Trucking Act*, S.B.C. 2014, c. 28 [*Act*] and the *Container Trucking Regulation,* B.C. Reg. 248/2014 [*Regulation*] in 2014, creating the Office of the British Columbia Container Trucking Commissioner (the "OBCCTC"). The OBCCTC was created to regulate issuance of licences and set minimum rates for payment of drivers, in order to provide labour stability. Container trucking companies seeking to provide services requiring access to a marine terminal within the Lower Mainland are required to apply for a licence from the OBCCTC.

[7] Gulzar and Jet Speed hold licences pursuant to the *Act* which allow trucks working for them to access the marine ports. Gulzar and Jet Speed are owned and operated by Satnam Singh Sidhu and his wife Sunpreet Kaur Sidhu.

The Audit and Investigation: July 2018 to November 2019

[8] Pursuant to the *Act,* the Commissioner can perform audits to ensure companies holding licences are complying with the record-keeping requirements and paying the statutory minimum rates to drivers. In July 2018, the Commissioner audited the June 2018 payroll records of the Companies. The initial audit found the Companies had paid drivers appropriately. Shortly after this initial audit, the Commissioner's auditor received additional information from one of the Companies' drivers, including a copy of an extra pay cheque for the month and another logbook, which had not been provided to the auditor by the Companies.

[9] The Commissioner authorized an investigation and the Companies' records were seized, including log books, time sheets and pay stubs. In November 2018, the auditor issued an interim report, finding incomplete records, inconsistent information

in the seized records when compared with the records provided by the Companies in the initial audit, and multiple sets of log books with conflicting information. The audit expanded and more documents were requested from the Companies.

[10] In April 2019, the auditor wrote to the Companies and advised she had concluded the Companies failed to pay regulated rates to their independent owner-operators (drivers that own their own trucks) and their employee drivers. The auditor advised that the Companies were required to calculate the amounts outstanding in wages to all drivers. Ultimately, the auditor determined that an amount of approximately $97,000 was owing to the independent owner-operators, which the Companies paid in May 2019.

[11] With respect to the amounts owing to the employee drivers, on October 30, 2019, the Commissioner directed the Companies to calculate those amounts using a formula supplied by the auditor for the time period of April 3, 2014 to April 30, 2019. The Companies did not agree with the methodology proposed by the auditor and did not perform those calculations. The auditor in her final report found the Companies did not comply with the *Act* and the terms of their licences, and committed the following violations:

a) non-payment of regulated rates to employee drivers;

b) non-payment of regulated rates to independent owner-operators;

c) misclassification of drivers;

d) falsification/modification of records; and

e) failure to produce, retain and submit records.

The Penalty Notice: November 19, 2019

[12] On November 19, 2019, the Commissioner issued its Notice of Penalty: CTC Decision No. 12/2019 (the “Penalty Notice”). The Commissioner accepted the findings of the auditor.

[13] As the Companies did not calculate the amounts owing to the employee drivers, the Commissioner directed the auditor to calculate the amount. The auditor calculated the amount to be approximately $1,159,379.49 for the time period of April 2014 to April 2019. The Commissioner found the Companies breached their obligations to pay minimal rates to drivers and did not comply with the orders of the Commissioner. The Commissioner gave notice pursuant to the *Act* that he proposed to cancel the Companies' licences.

The Companies' Response: the Sharma Report, January 10, 2020

[14] In response, the Companies sought an extension to make submissions on the proposed penalty. The Companies submitted calculations of amounts owing to employee drivers performed by a Chartered Professional Accountant (the "Sharma Report"). The Sharma Report calculated the amounts owing to employee drivers to be approximately $262,944.12 for the time period from April 2014 to April 2019. The Companies argued their licences should not be cancelled.

The Decision Notice: February 10, 2020

[15] On February 10, 2020, the Commissioner issued its Decision Notice: CTC Decision No. 12/2019 (the "Decision Notice"). The Commissioner considered the submissions of the Companies, but ultimately found that cancellation of the Companies' licences was justified.

[16] The Commissioner also ordered payments to be made to drivers to compensate them for what they were owed:

> In this case, the Companies' record keeping practices were such that the OBCCTC auditor was not able to determine with certainty the amount owed to each driver and was required to use a methodology based upon the available records to estimate amounts owing. The Companies, in response to the proposed cancellations of their licences, have now calculated driver hours in 2017 through 2019 and used the 2017 calculation to estimate specific amounts owing in 2014, 2015 and 2016 to sixty-seven drivers. This methodology was not approved by the OBCCTC, but it does result in a calculation of specific amounts owed to drivers. Given the OBCCTC's challenges in determining exact amounts owing to each driver using available records, I will base my order on the Companies' calculations so that the drivers will each be, at a minimum, awarded some compensation. This is necessary because the

> Companies' failure to keep proper records has impacted my ability to make an accurate award.
>
> Therefore, I order the Companies, pursuant to section 9 of the *Act* to immediately pay the total amount calculated by the Companies as owing to sixty-seven drivers identified in the Companies' calculations for the period from 2014 to 2019 ($262,944.12)…

The Companies' Submissions on the First Reconsideration: March 2020

[17] On March 3, 2020, the Companies sought reconsideration pursuant to the *Act*.

[18] As part of their submissions on reconsideration, the Companies sought a suspension of the licence cancellation, and proposed a further audit of their payroll for the time period from August 2019 to January 2020. In the interim pending reconsideration, the Commissioner suspended the cancellation of the licences and ordered another audit report to be completed.

The First Reconsideration Decision: May 21, 2020,

[19] On May 21, 2020, the Commissioner dismissed the reconsideration application and confirmed the cancellation of the licences: CTC Decision No. 06/2020 (the "First Reconsideration Decision"). The Commissioner noted that the Sharma Report contained "calculations using a methodology that was not approved by the OBCCTC but was ultimately accepted on the basis that some money reclaimed for drivers was better than none": para. 35 of the First Reconsideration Decision.

[20] Due to the COVID-19 pandemic and trucking being an essential service, the Commissioner delayed the licence cancellation until two weeks after the end of the provincial state of emergency.

The Judicial Review: January 2021

[21] The Companies sought judicial review of the Decision Notice and the First Reconsideration Decision. A stay of the licence cancellation was granted by this Court pending the completion of the judicial review.

[22] The judicial review was heard on January 13 and 14, 2021. As the licences that had been cancelled had already expired in November 2020, the parties agreed on a

consent order to set aside the First Reconsideration Decision, and to refer the matter back to the Commissioner to reconsider the issue of penalty.

The Second Reconsideration Decision: March 19, 2021

[23] On March 19, 2021, the Commissioner issued his Second Reconsideration Decision: CTC Decision No. 02/2021 (the "Second Reconsideration Decision"). This is the decision that is the subject of this judicial review.

[24] The Commissioner noted that the decision to cancel the Companies' licences had been set aside by consent as those licences had expired before the cancellation could take effect. The Commissioner noted that cancellation/suspension of the licences were no longer available penalties. The Commissioner then stated the following:

> 15. The nature and severity of the Companies' non-compliance is not in dispute. The Companies do not dispute my findings in this regard, and they did not ask the BC Supreme Court to consider them on judicial review. However, as a result of special circumstances, including the Covid-19 pandemic, the Companies have not been sanctioned for their non-compliance. As licence cancellation and suspension are no longer available penalties, I am obliged to consider an appropriate financial penalty.
>
> 16. The Companies submit that a financial penalty of $65,000 is appropriate in the circumstances because it would be proportionate to the findings of non-compliance, consistent with other penalties levied in what they characterize as similar circumstances, and would account for the Companies' "rehabilitation efforts and accomplishments." The Companies also ask that I consider the legal fees they have incurred in assessing an appropriate penalty.
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> 17. I do not accept that a penalty in the amount proposed by the Companies would be appropriate. I believe the maximum penalty available under the *Act* ($500,000.00) is appropriate.

The Legislation

[25] The *Act* contains in s. 12 a privative clause setting out the exclusive jurisdiction of the Commissioner:

> 12 (1) The commissioner has exclusive jurisdiction in all cases and for all matters in which jurisdiction is conferred on the commissioner by this or any other enactment.
>
> (2) An order, decision or proceeding of the commissioner must not be questioned, reviewed or restrained by any process or proceeding in any court.

[26] Penalties relating to licences are set out in Part 4 of the *Act*:

> 34 (1) Subject to subsection (2), if the commissioner is satisfied that a licensee has failed to comply with this Act or the terms and conditions of the licensee's licence, the commissioner may, in accordance with this Part and within 6 months after becoming aware of the licensee's failure to comply, take one or more of the following actions:
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> (a) order that the licensee's licence be suspended for the period specified by the commissioner;
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> (b) order that the licensee's licence be cancelled;
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> (c) order that an administrative fine be imposed on the licensee.

[27] The procedure for initiating a reconsideration of a decision of the Commissioner is set out in s. 38. The powers of the Commissioner on a reconsideration are set out in s. 39:

> 39 (1) Despite the filing of a notice of reconsideration under section 38 (1) but subject to subsection (2) of this section, the commissioner's decision that is subject to the reconsideration remains in effect until the outcome of the reconsideration.
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> (2) On a reconsideration from an order of the commissioner referred to in section 34 (1) (a), (b) or (c), the commissioner may, at any time before making a final determination on the reconsideration, order that the commissioner's order be suspended until the outcome of the reconsideration.
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> (3) On a reconsideration under this section, the commissioner must, after considering the information provided by the licensee,
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> (a) rescind the commissioner's decision, or
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> (b) confirm the commissioner's decision.
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> (4) The commissioner must provide notice to the licensee of the decision made under subsection (3).
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> (5) If the suspension or cancellation of a licence is rescinded, the commissioner must promptly reinstate and, if necessary, reissue the licence that was suspended or cancelled.
>
> (6) If the imposition of a condition or the amendment of a licence is rescinded, the commissioner must promptly reissue the licence with the condition removed or the amendment reversed.

The Standard of Review

[28] As the *Act* contains a privative clause, the parties agree the standards of review of a decision of the Commissioner are governed by s. 58 of the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*]:

> 58 (1) If the Act under which the application arises contains or incorporates a privative clause, relative to the courts the tribunal must be considered to be an expert tribunal in relation to all matters over which it has exclusive jurisdiction.
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> (2) In a judicial review proceeding relating to expert tribunals under subsection (1)
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> (a) a finding of fact or law or an exercise of discretion by the tribunal in respect of a matter over which it has exclusive jurisdiction under a privative clause must not be interfered with unless it is patently unreasonable,
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> (b) questions about the application of common law rules of natural justice and procedural fairness must be decided having regard to whether, in all of the circumstances, the tribunal acted fairly, and
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> (c) for all matters other than those identified in paragraphs (a) and (b), the standard of review to be applied to the tribunal's decision is correctness.
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> (3) For the purposes of subsection (2) (a), a discretionary decision is patently unreasonable if the discretion
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> (a) is exercised arbitrarily or in bad faith,
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> (b) is exercised for an improper purpose,
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> (c) is based entirely or predominantly on irrelevant factors, or
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> (d) fails to take statutory requirements into account.

[29] The standard of review for discretionary decisions of the Commissioner is patent unreasonableness. This is the most deferential standard of review: *College of Physicians and Surgeons of British Columbia v. The Health Professions Review Board,* 2022 BCCA 10 at para. 130.

[30] The Supreme Court of Canada in *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, described the standard of patent unreasonableness as follows:

> [28] A legal determination like the interpretation of a statute will be patently unreasonable where it "almost border[s] on the absurd": *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, 2004 SCC 23, [2004] 1 S.C.R. 609, at para. 18. In the workers' compensation context in British

> Columbia, a patently unreasonable decision is one that is "openly, clearly, evidently unreasonable": *Speckling v. British Columbia Workers' Compensation Board)*, 2005 BCCA 80, 46 B.C.L.R. (4th) 77, at para. 33; *Vandale v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2013 BCCA 391, 342 B.C.A.C. 112, at para. 42 (emphasis deleted).

[31] The Court on judicial review is to assess the decision as whole to determine if it is clearly irrational. In *Team Transport Services Ltd. v. Unifor, Local No. VCTA*, 2021 BCCA 211, Madam Justice Saunders wrote:

> [27] … [A] court may only interfere with a decision of the Board when the court is satisfied that the Board's decision is patently unreasonable. That standard continues to apply notwithstanding developments of the common law standards of review, and it continues to mean what it meant when the Administrative Tribunals Act came into force: *Red Chris* [*Development Company Ltd. v. United Steelworkers, Local 1-1937*, 2021 BCCA 152] at para. 29.
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> [28] Patent unreasonableness is the standard that is most highly deferential to the decision maker. There are many descriptions of the standard. The explanation found in *Victoria Times Colonist v. Communications, Energy and Paperworkers*, 2008 BCSC 109 (aff'd *Victoria Times Colonist, a Division of Canwest Mediaworks Publications Inc. v. Communications, Energy and Paperworkers Union of Canada, Local 25-G*, 2009 BCCA 229) is useful:
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> > [65] When reviewing for patent unreasonableness, the court is not to ask itself whether it is persuaded by the tribunal's rationale for its decision; it is to merely ask whether, assessing the decision as a whole, there is any rational or tenable line of analysis supporting the decision such that the decision is not clearly irrational or, expressed in the *Ryan* [*Law Society of New Brunswick v. Ryan*, 2003 SCC 20] formulation, whether the decision is so flawed that no amount of curial deference can justify letting it stand. If the decision is not clearly irrational or otherwise flawed to the extreme degree described in *Ryan*, it cannot be said to be patently unreasonable. This is so regardless of whether the court agrees with the tribunal's conclusion or finds the analysis persuasive. Even if there are aspects of the reasoning which the court considers flawed or unreasonable, so long as they do not affect the reasonableness of the decision taken as a whole, the decision is not patently unreasonable.
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> [29] In other words, the standard is at the most deferential end of the reasonableness standard ….

[32] This approach was recently endorsed in *Pereira v. British Columbia (Labour Relations Board),* 2023 BCCA 165 at para. 93. Even if the Court concludes the Commissioner is incorrect, as long as he has acted within his jurisdiction the Court cannot interfere: *Pereira* at para. 94.

[33] On judicial review, the Court is to assess the decision of the adjudicator as a whole, as recently explained in *Campbell v. The Bloom Group*, 2023 BCCA 84 at para. 40:

> The reasons of a judge or other adjudicator are to be assessed applying a functional and contextual approach. This means those reasons are to be considered in their entirety and in context: *R. v. G.F.,* 2021 SCC 20 at para. 69; *R. v. Albashir*, 2023 BCCA 6 at para. 35. Individual sentences should not be isolated and minutely inspected without regard to the full judgment: *R. v. Morrissey* (1995) 1992 CanLII 1487 (BC CA), 77 C.C.C. (3d) 193 (Ont. C.A.) at para. 28. So too, on judicial review, the reasons of an adjudicator are not to be parsed but rather are to be read as a whole: *Kenyon v. British Columbia (Superintendent of Motor Vehicles),* 2015 BCCA 485 at paras. 53 and 54.

[34] Issues with procedural fairness are assessed on whether the tribunal acted fairly: *Gichuru v. Law Society of BC*, 2010 BCCA 543 at para. 29.

Grounds of Review

[35] The Companies argue that the Commissioner erred in his Second Reconsideration Decision by:

1. Unfairly relying on an estimate of wages owed to its employees calculated by its auditor in coming to his penalty determination, without notice to the Companies;

2. Characterizing the Companies' conduct as so severe as deserving of the maximum administrative penalty; and

3. Imposing a $500,000 fine without conducting a proper reconsideration.

Analysis

[36] While I have set out the rulings which preceded the Second Reconsideration Decision, the only decision that is the subject of this judicial review is the Second Reconsideration Decision. The previous decisions are referenced in the Second Reconsideration Decision and are also important for context.

1. Was the Commissioner's use of the OBCCTC estimate procedurally unfair?

[37] The Companies argue the Commissioner unfairly used the OBCCTC estimate of wages owed to employee drivers in coming to his determination of the penalty. The OBCCTC estimate was not the estimate that was used in the Commissioner's order for payment to the employee drivers; rather, the Commissioner had accepted the calculation in the Sharma Report for that purpose. The Companies argue they could not have known the higher OBCCTC estimate was still in play, and they ought to have been provided notice that the OBCCTC estimate was to be relied on so they could have made submissions.

[38] The Commissioner argues there was no procedural unfairness. The calculation in the Sharma Report was never accepted as the amount of lost wages to the employee drivers, but ordered as the best the Commissioner could do. The Commissioner's reference to the OBCCTC estimate was appropriate and not a ground to set aside the Second Reconsideration Decision.

[39] The Commissioner referenced the OBCCTC estimate in the Second Reconsideration Decision three times. The first reference is at para. 7, which was a recitation of the history of the matter. The second reference is under a discussion of "proportionality" at para. 20:

> The degree to which the Companies' drivers were financially harmed was never properly established because of the Companies' conduct, including their failure to maintain accurate records. It is clear, however, that the Companies' actions, including their refusal to comply with an OBCCTC order and their failure to keep comprehensive and accurate records meant that the employee drivers received less money than they were entitled to receive, to the benefit of the Companies. Ultimately, the Companies' employee drivers received $262,944.12 between them, for the period between 2014 and 2019. As I have already said, this was an amount calculated by the Companies themselves based on a method that was not approved by the OBCCTC auditor. The OBCCTC auditor estimated, based on averages taken from the records that the OBCCTC was able to obtain, that the Companies' employee drivers were owed an amount in the range of $1,159,379.49 in unpaid remuneration for the same time period. The maximum penalty of $500,000 is still considerably smaller than the amount by which the Companies appear to have been enriched.

[40] The third reference is under a discussion of "rehabilitation and deterrence" at para. 38:

> Additionally, the Companies' under-compensation of their drivers over time, and their conduct during the course of the audit (their intentionally withholding records from the OBCCTC, refusal to calculate amounts owing based on the OBCCTC methodology, inadequate record keeping, and pre-emptive payments to drivers), both resulted in their enrichment at the expense of their drivers (I/Os and company drivers). On the OBCCTC's assessment, based on averages extracted from the Companies' documents that the auditor was able to review, the Companies' employee drivers were owed $1,159,379.49 in unpaid remuneration. The Companies have issued payment to their company drivers based on their own calculations in the amount of $262,944.12. This represents an estimated difference of $896,435.37, significantly more than the maximum $500,000.00 penalty. A $500,000 penalty in these circumstances is not "crushing" or "unfit".

[41] In my view, there was no procedural unfairness in how the Commissioner used the OBCCTC estimate in his Second Reconsideration Decision. In the circumstances, there was no need for the Commissioner to have provided notice to the Companies and invited submissions on the OBCCTC estimate.

[42] The Companies argue procedural fairness dictates that they had a right to know the case they had to meet, and be afforded a fair opportunity to respond: *Patton v. British Columbia Farm Industry Review Board*, 2021 BCCA 75 at paras. 99–104 and *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65. They argue the principle is engaged here as they were not aware the amount of wages owed to employee drivers was in dispute as the Commissioner had ordered payment by the Companies to the drivers based on the Sharma Report. The Companies argue the Commissioner had deemed the OBCCTC estimate too unreliable to form the basis for a payment order, and had found the Sharma Report to be appropriate.

[43] In my view, that is not a fair reading of the Commissioner's view on the accuracy and reliability of the calculations in the Sharma Report. In the Decision Notice, the Commissioner made clear that the Sharma Report was calculated based on a methodology that his office did not accept: p.10-11 of the Decision Notice. Payment was made to the drivers based on the Sharma Report as it was the best the

Commissioner could do to ensure payment of some money to drivers. The OBCCTC estimate was a global estimate and did not allow the Commissioner to make specific payments to each driver: p.11 of the Decision Notice. Again, in the First Reconsideration Decision, the Commissioner repeated this view, that some payment to drivers was better than none: para. 35 of the First Reconsideration Decision.

[44] I do not agree the Companies did not have notice that the issue of the Companies' unpaid wages to company drivers continued to be in dispute. The Commissioner in each of his decisions made clear that he was not able to come to any accurate calculation of unpaid wages due to the Companies' record keeping practices and lack of co-operation. There was no need for the Commissioner to have provided notice to the Companies that the issue of calculation of unpaid wages to drivers remained in dispute, and invited submissions on how this may affect his penalty determination. The reason the Sharma Report was used for the payment order was explained, and the Commissioner made clear it was not because he accepted the accuracy of its calculations. The Commissioner never stated that, in his view, the OBCCTC estimate was too uncertain or unreliable to form the basis for a payment order. He had explained in earlier decisions that the OBCCTC estimate was a global estimate that did not allow him to make specific payments to individual drivers and that was the reason the OBCCTC estimate was not used to make payment orders.

[45] The Companies also argue the Commissioner used the OBCCTC estimate to determine the extent to which the Companies had been enriched by their non-compliant payment practices. The Companies argue the Commissioner made a finding that the extent of the enrichment was $1,159,379.49, and used that finding to buttress the fitness of the $500,000 penalty. They argue that finding was made in a procedurally unfair manner, without notice to them.

[46] In the alternative, the Companies argue if the Commissioner did not make such a finding, then the Commissioner ought not to have relied on the OBCCTC estimate to determine penalty, as it was irrelevant.

[47] In my view, reading the decision as a whole, the Commissioner did not make a finding that the Companies owed $1,159,379.49 in unpaid wages to its drivers. As stated in the decision, “the degree to which the Companies’ drivers were financially harmed was never properly established”. The Commissioner found the drivers were paid less than what they ought to have received, the OBCCTC auditor estimated that amount to be significantly more than $500,000, the calculations in the Sharma Report were not approved by the OBCCTC but accepted for the basis of payment orders, and the reason the precise amount could not be calculated was due to the Companies’ actions. The Commissioner made clear he was not able to determine the precise amount owed to the company drivers with accuracy.

[48] The Companies now take issue with the Commissioner’s reliance on the discrepancy between the OBCCTC estimate and the Sharma Report, a difference of approximately $896,435, in coming to his conclusion on penalty. The Companies argue if the Commissioner did not make a finding that the Companies owed $1,159,379.49 in unpaid wages to its drivers, then the discrepancy between that amount and the Sharma Report amount is irrelevant and ought not be considered in his exercise of discretion in the determination of penalty. The Companies argue the Commissioner ought not have relied on the $1,159,379.49 figure in considering penalty, as he did not make a finding that this was the precise amount of unpaid wages. Pursuant to s. 58(3)(c) of the *ATA*, the Companies argue the Commissioner exercised his discretion “based entirely or predominantly on irrelevant factors”. The Companies rely on *DiNardo v. Ontario (Liquor Licence Board*) (1974), 49 D.L.R. (3d) 537, 1974 CanLII 703 (Ont. H.C.) to argue one factor that is irrelevant out of several factors is sufficient to find the decision was based “entirely or predominantly” on an irrelevant factor.

[49] In my view, the Companies take an unduly narrow approach in parsing the Second Reconsideration Decision. The Commissioner did not consider any irrelevant factors in his determination of penalty. The estimated amount of unpaid wages to the drivers was not an irrelevant factor. I do not accept that unless there was a finding as

to the precise amount of unpaid wages, the Commissioner cannot rely on an estimate in his determination of the appropriate penalty.

[50] Further, I do not accept that the Commissioner, in exercising his discretion in determination of the penalty, relied entirely or predominantly on irrelevant factors. The *DiNardo* decision did not deal with the patently unreasonable standard. The decision is of limited assistance. In this case, judicial review is within the parameters of the *Act* and the *ATA*.

[51] Even if the estimate of enrichment was an irrelevant factor, the Commissioner did not rely on it entirely or predominantly in his determination of the penalty. The estimate of enrichment to the Companies due to their conduct was one of several factors the Commissioner considered. The Commissioner also considered the severity of the Companies' misconduct, including "systemic, consistent, deliberate and deceptive" accounting and record keeping practices over an extended period of time: para. 32 of the Second Reconsideration Decision. The Commissioner found the Companies took deliberate action to cover-up their non-compliant payments to drivers.

[52] In relation to the use of the OBCCTC estimate by the Commissioner in the Second Reconsideration Decision, I find no procedural unfairness or an exercise of discretion that was patently unreasonable.

2. Was the characterization of the Companies' conduct as so severe as deserving of the maximum administrative penalty patently unreasonable?

[53] The Companies argue the Commissioner's assessment of the severity of the Companies' misconduct was patently unreasonable. The Companies make three arguments:

a) it was a defect in logic for the Commissioner to have jumped to the maximum administrative penalty once he found it was the most severe misconduct to date the OBCCTC has seen, as this regulatory regime has only been in existence since 2014;

b) he did not do a proper assessment of the aggravating and mitigating factors between this case and the past decisions cited to him; and

c) the Commissioner did not provide any explanation for the jump from a penalty of $60,000, which was the highest imposed in past cases, to $500,000.

[54] The Companies argue the Commissioner's assessment of the relative blameworthiness of the Companies' conduct was deficient, and his determination of the penalty was patently unreasonable.

[55] In my view, the Commissioner did not base his decision that a penalty of $500,000 was appropriate only on the fact that the Companies' misconduct was the worst to date. The Companies rely on para. 33 in making this argument:

> The Companies' conduct represents the worst possible factual scenario underlying a finding of non-compliance with the regulatory regime under the *Act* to date. The harshest penalty available is necessary to denounce the severity of the Companies' misconduct.

[56] The Companies take an overly narrow view and do not take this passage in context. Read as a whole, the Commissioner did not jump to the maximum fine only on the basis that the Companies' misconduct was the worst to date. The Commissioner in his Second Reconsideration Decision considered many factors, including the nature of the misconduct (wilful deceit in effort to cover-up the improper payments to drivers), the length of the misconduct (over an extended period of time), enrichment to the Companies at the expense of the drivers (the drivers did not receive the statutory minimum rates), lack of true rehabilitation (only addressing violations once they have been caught and a licence cancellation proposed), and the size of the Companies (the Companies employed many drivers). It simply cannot be said the Commissioner jumped to the maximum fine on the sole basis of the worst misconduct to date.

[57] The Companies also argue the Commissioner did not conduct a proper assessment of mitigating and aggravating factors between this case and cases cited to him.

[58] The Companies argue the Commissioner only considered how the misconduct in this case was better or worse than in the cases cited to him, but did not consider how the absence in this case of aggravating factors found in the other cases should affect the penalty imposed on the Companies. Further, the Companies argue the Commissioner did not give proper weight to the mitigating factors present.

[59] In my view, the Commissioner did a proper assessment of mitigating and aggravating factors. There was no misapprehension of the use of those factors in determining a proper penalty. The Commissioner distinguished the cases submitted by the Companies: *Gantry Trucking Ltd*. CTC Decision No. 2/2018, *Re Roadstar Transport Company Ltd*., CTC Decision No. 20/2018, and CTC Decision No. 01/2019, and *Sandhar Trucking Ltd*., CTC Decision No. 18/2018. The Commissioner found the circumstances of these three cases were not similar to the circumstances of this case.

[60] The Commissioner noted that in *Roadstar*, the company was involved in one instance of altering financial documents, where in this case the misconduct of falsifying records occurred over many years; in *Gantry Trucking*, the company "did not construct and keep secret from the OBCCTC an elaborate method of bookkeeping for the purpose of paying non-compliant rates"; and in *Sandhar*, there was no pattern of misconduct which had occurred only once. The Commissioner was familiar with the aggravating and mitigating circumstances in the cases cited to him. There is a basis for the Commissioner to have found these decisions distinguishable, and it was not patently unreasonable for the Commissioner to have done so. Read as a whole, the Second Reconsideration Decision did properly assess the Companies' mitigating and aggravating factors, and the weight placed by the Commissioner on those factors was not patently unreasonable.

[61] The Companies argue the Commissioner failed to provide any explanation as to why the penalty needed to be $500,000, and why a lesser penalty may not have

sufficed. The Companies argue that, without a proper explanation, the $500,000 penalty was arbitrary and patently unreasonable.

[62] In my view, the Commissioner did provide reasons for the imposition of the $500,000 penalty. Throughout the decision, the Commissioner emphasized the nature and severity of the Companies' non-compliance. The Commissioner at para. 19 also noted the Companies' previous history of non-compliance, the duration of the non-compliance, the systematic and deliberately deceptive nature of the underpayments and manipulation of accounting records, the Companies' falsification of two statutory declarations, their lack of cooperation during the audit, and their refusal to comply with an order of the Commissioner to calculate the unpaid wages to drivers using a formula set out by the auditor. The Commissioner also considered the Companies' submission that they have achieved rehabilitation, and the need for both specific and general deterrence. The discretion to impose the $500,000 penalty was well-considered, explained, and not arbitrary.

3. Was the discretionary decision to impose a $500,000 penalty patently unreasonable?

[63] In this last ground for review, the Companies make three further arguments in support of their contention the penalty was patently unreasonable.

[64] The Companies argue the Commissioner's rationale for not considering legal fees paid by the Companies in the first judicial review proceeding in 2021 was patently unreasonable. The Companies take issue with the Commissioner's decision at para. 43:

> The *Act* empowers the OBCCTC to impose administrative penalties for non-compliance in order to achieve the Act's overall objective of labour stability in the drayage industry. Considering legal costs when assessing a penalty would not, in my opinion, be consistent with the object of the *Act*, in part because it could incentivize legal challenges to administrative penalties. Additionally, a financial penalty will not have the necessary deterrent effect if it can be reduced in consideration of legal fees incurred in response to findings of non-compliance. It would also complicate a decision-maker's ability to penalize similar offenders similarly if comparable fines for comparable breaches could be adjusted in light of any legal fees incurred. I will not consider legal fees incurred by licensees when determining an appropriate penalty quantum.

[65] It must be noted the Companies presented to the Commissioner no cases from the courts or other administrative tribunals where legal fees were considered in determination of penalty: para. 42 of the Second Reconsideration Decision.

[66] The Commissioner's rationale for not considering the Companies' legal fees is sound. The Commissioner found the Companies' legal fees "were incurred as a result of their non-compliant activity and their own decision-making in the circumstances": para. 42 of the Second Reconsideration Decision. The Commissioner further reasoned that deducting legal fees would not be consistent with the object of the *Act*, by incentivizing legal challenges, undermining deterrent effects of financial penalties and complicating the application of the parity principle in future cases. Further, in this case, the result of the first judicial review was a consent order to remit the matter of penalty back to the Commissioner on account of licence cancellation no longer being a viable penalty as the licences had already expired. It was not a determination by the Court that the penalty of licence cancellation ought to be set aside as being patently unreasonable or procedurally unfair. As such, any argument that the Companies ought to benefit from an adjustment of the ultimate penalty by deducting their legal fees from the first judicial review loses its force.

[67] In my view, the Commissioner's decision to not consider the Companies' legal fees in the first judicial review is not patently unreasonable.

[68] The Companies argue next that the Commissioner did not properly consider their submission that general deterrence ought to have less weight in these circumstances, as the initial penalty decision had become notorious in the industry. The Companies take issue with the Commissioner's comment that they did not "provide any evidence to suggest that the decisions' notoriety has resulted in increased compliance". The Companies argue there is no way for the Companies to satisfy that evidentiary requirement. They argue this shows the Commissioner's decision was patently unreasonable and ought to be set aside.

[69] With respect, in my view, the Court's role on judicial review is to assess the decision as a whole on the patently unreasonable standard, and not each statement

in the decision. The Companies are again taking an unduly narrow view of a single statement in the decision, and not reading the decision as a whole. The central issue here is the Companies' argument that general deterrence ought to have less weight. In the context of this proceeding, it was not patently unreasonable for the Commissioner to find that general deterrence was not to be given less weight. The licence cancellation had been set aside, and it was appropriate for the Commissioner to find that general deterrence remained a valid consideration. A final determination of penalty had not yet been made and it was not patently unreasonable for the Commissioner to continue his consideration of the need for general deterrence.

[70] The Companies argue the Commissioner did not properly conduct a second reconsideration of the penalty. The Companies argue the Commissioner ought to have undertaken a fresh weighing of the relevant principles, the aggravating and mitigating factors, to determine an appropriate penalty. Instead, the Commissioner approached the second reconsideration as an exercise in finding the most severe penalty that would approximate as close as possible to licence cancellation.

[71] The consent order from the first judicial review only set aside the First Reconsideration Decision. The issue of penalty was referred back to the Commissioner, with the understanding of all parties that licence cancellation was no longer viable as a penalty as the licences had already expired. The consent order did not affect the Penalty Notice or the Decision Notice. The findings of the nature and severity of the Companies' non-compliance outlined in those decisions remained.

[72] In my view, the Commissioner did properly conduct a second reconsideration of the penalty. The Commissioner invited submissions from the Companies, and considered those submissions. The Commissioner considered the nature and severity of the non-compliance, the principles of proportionality, parity, rehabilitation and deterrence, and arrived at a penalty. As part of the background and context, the Commissioner was well aware of the previous proceedings, and his findings in those earlier decisions were not challenged. His earlier assessment of the seriousness of the Companies' misconduct stood. He was entitled to consider his findings in that

regard, and the penalty imposed is not patently unreasonable. The penalty was within the range and was one that the Commissioner could impose. There is a tenable line of reasoning which leads to his conclusion on penalty, and it cannot be said that the penalty was absurd, clearly irrational, or evidently and clearly wrong. Absent a finding of patent unreasonableness or procedural unfairness, the Commissioner's decision is entitled to deference.

Conclusion

[73] The Companies' petition for judicial review of the Commissioner's Second Reconsideration Decision is dismissed.

[74] Based on the submission of the parties, each party should bear its own costs.

"Chan, J."